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February 1, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, CC Docket No. 93-22

Dear Mr. Caton:

900 America, Ltd., a provider of interstate pay-per-call services and other information services, applauds the Commission for its recognition in the captioned rulemaking that the Telephone Disclosure and Dispute Resolution Act ("TDDRA") seeks to "ensure that pay-per-call regulations do not stifle mutually beneficial business arrangements" between information providers (IPs") and their customers.(1) The Commission's proposals in its August 31, 1994 Further Notice, however, are flatly inconsistent with this statutory policy because they would impermissibly expand the statutory definition of "pay-per-call services." Applying TDDRA regulation to services that are not within the Act's scope, such as directory assistance and tariffed international services, would impair existing business arrangements in the information services industry making economic survival for most IPs problematic at best.

In particular, the Commission's proposal to require advance, written contracts for all "presubscription or comparable arrangements" is a transparent and unlawful attempt to close down one segment of the information services market based on subjective distaste for the adult-oriented content of many such services. The Further Notice appears to assume that TDDRA's prohibition on the use of 800 numbers includes those information services that TDDRA specifically exempts from pay-per-call.

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(1) Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket No. 93-22, ¶ 23 (released Aug. 31, 1994) ("FNPRM" or "Further Notice").

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FNPRM at ¶¶ 25, 27. Furthermore, both the Commission and some of the comments suggest that directory assistance provided via 800 access as well as tariffed services, such as direct dialed international traffic, are contrary to TDDRA's goals. Id.; BellSouth at 7 ("[t]he exemption for information services provided at a tariffed charge likewise affords a vehicle for evading the letter and spirit of the TDDRA and Commission Rules.")

These proposals, and their underlying assumption that the Commission is empowered to regulate services not covered by TDDRA's limited definition of pay-per-call services, are plainly incorrect. It is clear from the Act's statutory language that Congress sought to refrain from interfering unnecessarily in the information services market by strictly limiting its scope to pay-per-call services. Section 228(a) defines TDDRA's purpose as "to put into effect a system of national regulation and review that will oversee interstate pay-per-call services" (emphasis added). The Act's preamble makes clear that it's overriding purpose is "[t]o protect the public interest and the future development of pay-per-call technology by providing for the regulation and oversight of the applications and growth of the pay-per-call industry" (emphasis added). None of the commentors even attempts to argue that the Act's legislative history demonstrates that any of TDDRA's provisions let alone the 800 blocking provision, was intended to have a broader scope that the pay-per-call definition.

Contrary to certain commentors, TDDRA's prohibition on the use of 800 numbers for pay-per-call services "does not act as a blanket prohibition against billing 800 access telecommunications services to the calling party." See Brief of MCI, File No.E-95-2 (filed Nov. 14, 1994)("MCI Brief"). AT&T, Southwestern Bell and others argue that under Section 228(6)(C) of the Act, 47 U.S.C. § 228(6)(C), IPs are prohibited from providing all "information" services, even non-pay-per-call services, through 800 access. However, this argument is incorrect in that the scope of TDDRA is strictly limited to pay-per-call services. MCI has shown that:

> As used in the TDDRA the term "information" is undefined... [H]owever, Congress clearly intended to address the provision of "pay-per-call services," a defined term under the statute.

MCI Brief at 10-11. By the same token, tariffed services and calls charged pursuant to preexisting contractual arrangements are also expressly exempt from TDDRA's regulation.

The central question presented in this rulemaking is therefore whether TDDRA's 800 prohibition encompasses services excluded from the scope of "pay-per-call" services under TDDRA. This issue of statutory interpretation is a key practical element in the evolving information services industry that must be resolved in this proceeding. Although the Further Notice implicitly recognized that international services are beyond the scope of TDDRA, FNPRM at ¶ 27 n.36, several parties assert that international direct dial services should be prohibited if they contain information content. Southwestern Bell at 11; BellSouth at 7. Similarly, AT&T's attack on MCI's provision of directory assistance via 800 access, with charges billed to the originating telephone line, raises precisely the same question of the interplay between the Act's 800 prohibition and its precise definition of pay-per-call services. That formal complaint proceeding has now been suspended pending Commission decision in this docket. AT&T Corp. v. MCI Telecommunications Corp., Stipulation and Joint Motion to Dismiss Complaint, File No. E-95-2 (filed Dec. 29, 1994). 900 America firmly believes that Commission resolution of this issue is essential to business planning in the information services industry, and urges the Commission to decide the matter promptly.

There can be no legitimate questions that because TDDRA specifically exempts "directory assistance, any service the charge for which is tariffed, or any calls, made under a presubscription or comparable arrangement, "47 U.S.C. § 228(c)(i)(2), information provided under any of these mechanisms is outside the scope of federal regulation. For example, IPs who provide information services through an international direct dial call, the charges for which are tariffed, are clearly not providing "pay-per-call services" for purposes of TDDRA. In fact, the FNPRM recognizes, albeit reluctantly, that information provided by tariffed direct dial international calls are to be treated

> in the same way as basic telephone services, not as information services. Thus, charges are assessed at the tariffed rate applicable to all telephone calls to the particular foreign location. Because charges do not exceed the tariffed rate, international information services do not fall within the statutory definition of pay-per-call services and, consequently are not subject to federal regulations governing pay-per-call services.

FNPRM, ¶ 27 n.36 (emphasis added).

Critics characterize the use of tariffed international calls as a vehicle for "evading" TDDRA's purposes. Southwestern Bell at 11-12. To the contrary, whether carriers or the Commission like the content of such services or their rates, they simply are not subject to federal pay-per-call regulation. Since international calls are tariffed services, they are statutorily exempt from the regulations governing pay-per-call and outside the Commission's regulatory authority. The Commission should not, indeed cannot, take up the invitation of the these parties to prohibit by regulation "international information services" provided at tariffed rates. At the very least, significant due process and Administrative Procedure Act issues would be raised by Commission adoption of a proposal not set forth in its Further Notice.

The Further Notice clearly proposes to amend Section 64.1504 (b) of the Commission's Rules to require IPs to obtain a written presubscription arrangement from all of its consumers, who the IP must verify are legally competent, before providing any pay-per-call service. FNPRM at ¶¶ 28, 29. These proposals quite simply would effectively destroy the information services industry--a result the Commission admitted that TDDRA does not intend and, indeed, seeks to avoid by providing specific exemptions to the pay-per-call definition. Many commentors in this proceeding are aggressively critical of the type of information services some IPs offer, specifically adult entertainment information. Rather than geared at protecting consumers from abusive practices while preserving "mutually beneficial business arrangements" for IPs and end users, the Commission's written contract proposal is a thinly camouflaged assault on the adult information services industry as a whole.

The Commission's requirement of a written presubscription contract with a legally competent consumer would make information services to unattractive, and of severely impair IPs' billing options, that the market would likely to destroyed. Most of the information services market is oriented to "impulse" purchasers. In fact, IPs heavily invest in advertising encouraging consumers to "call now." There is absolutely nothing inherently evil about this marketing strategy. Many industries, including television shopping services such as QVC, Home Shopping Network and "infommercials," employ this type of marketing. The strict proposed requirement of a written presubscription arrangement is thus completely inconsistent with the information services market. Instead of signing up a customer--with

disclosure and the Commission's existing safeguards in Section 64.1501(b) of the Rules--as an impulse purchaser, IPs would need to prepare a written contract and have it executed, and returned via mail, before providing service to any new end user.

Under the FCC's proposals, IPs will effectively be unable to bill their consumers. Because credit or charge cards will be the only acceptable alternative to a written presubscription contract, the information services industry, in particular adult services and sports information providers, will have lost its last remaining option for billing and collection. Credit card companies like VISA and Mastercard are now extremely reluctant to grant IPs "merchant accounts" for telecommunications services, making the credit card alternative virtually meaningless as a practical matter. Furthermore, local exchange carriers are refusing to bill consumers for 900 services. Thus, credit card, charge card, and LEC billing are not realistic mechanisms by which IPs can bill their consumers. In a well-orchestrated indirect attack on the information services industry, IP critics have structured the regulations to effectively snuff out this industry. Adding to the downward spiral of the industry is AT&T's Tariff FCC No. 2, which permits immediate termination rather than after 10 days notice when AT&T unilaterally determines that an IP's practices may violate TDDRA--a tariff revision the Commission permitted to become effective without any consideration of its reasonableness or effect on the industry. The culmination of these restrictions on the information services industry has foreclosed virtually all business and marketing alternatives available to IPs.

In sum, the only remaining practical mechanism by which IPs can bill their consumers is a "presubscription or comparable arrangement." Now, however, the Commission is proposing to regulate these arrangements in a way that would cast the final blow on the information services market. Nothing in the FNPRM or the marketplace indicates that the exisiting requirements for disclosure, affirmative end user consent and separation of the contractual transaction from delivery of pay-per-call entertainment are inadequate safeguards to protect consumers. In this context, rather than responding to real policy problems, the Further Notice's written contractual proposals are nothing more than another camouflaged assault on the industry designed to "stifle mutually beneficial business arrangements between IPs and their customers," a result Congress expressly--and correctly--forbid in TDDRA.

Pursuant to the Commission's Rules, two copies of the ex parte submission are enclosed for filing in the public record of this proceeding.

Sincerely

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Chief Executive Officer
900 America, Ltd.

Enclosures

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